IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. .

GOLD FUEL SERVICE, INC., a Corporation of the State of New Jersey,

Plaintiff-Petitioner,

vs.

ESSO STANDARD OIL COMPANY, a Corporation of the State of Delaware,

Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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No.

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vs.

ESSO STANDARD OIL COMPANY, a Corporation of the State of Delaware,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Gold Fuel Service, Inc., a corporation of the State of New Jersey, hereinafter referred to as Gold, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in this case on June 6, 1960, by mandate of said court (Appendix B), which affirmed an order for summary judgment (R34a), in favor of the defendant, Esso Standard Oil Company, a corporation of the State of Delaware, hereinafter referred to as Esso, entered January 8, 1960 in the Superior Court of New Jersey, Chancery Division.

Opinions Below.

The opinion of the Supreme Court of New Jersey, affirming the order for summary judgment, is reported in 32 N. J. 459, and is printed in the Appendix hereto, as Appendix A.

The opinion of the Superior Court of New Jersey, Chancery Division, is reported in 59 N. J. Super. 6, and is also printed in the Record filed herewith (R23a).

Gold's main brief below is being submitted to this Court following the filing hereof.

Jurisdiction.

The mandate of the Supreme Court of New Jersey, affirming the order for summary judgment, is dated June 6, 1960, and is printed in Appendix B hereto.

This Petition was filed within 90 days from the date of said mandate in accordance with the rules.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C. secs. 1257, 2101.

Questions Presented.

1. Where a price given to a competitor's customer is less than the figure at which the competitor can buy for resale, is not a sale at such price in violation of 15 U. S. C. sec. 13a, as unreasonably low and for the purpose of destroying competition or eliminating a competitor?

2. Where such sale is but one of a series of similar sales direct to ultimate consumers at prices lower than those at which wholesalers or distributors can purchase in the fuel oil market for resale, and such sales are in interstate commerce, are not such sales in violation of 15 U. S. C. sec. 2, as an attempt to monopolize a part of interstate commerce?

3. Does not such sale give rise to a common law action in tort for damages for unfair competition, in that Esso's competition with Gold was conducted by illegal means, per violation of U. S. C. secs. 2 and 13a?

4. Did not the New Jersey courts have jurisdiction to adjudicate that Esso had been and is guilty of unfair competition by unlawful means, i. e., in violation of such federal statutes?

5. Is a common law action in a state court for unfair competition, by means in violation of U. S. C. secs. 2 and 13a, one for the enforcement of such statutes?

6. May not section 13a of Title 15 be enforced directly in a state court suit for damages other than treble?

7. Can the fact that Esso was invited to bid by Gold's customers excuse a violation of sections 2 or 13a of Title 15?

Constitutional and Statutory Provisions Involved.

Article VI, clause 2, of the Constitution of the United States.

15 U. S. C. secs. 2, 13a.

Statement of the Case.

The amended complaint (R6a) is in two counts. The first count is for compensatory and punitive damages (R9a), and the second count for accounting and injunctive relief (R10a). The second count was expressly abandoned below.

The first count alleges that Gold's predecessor was, for many years prior to December 10, 1957, in the business of fuel oil distribution to industrial and other consumer-level users in northeastern portions of New Jersey; that on December 10, 1957 Gold was formed, which absorbed all the business, good will and assets of the predecessor partnership and continued the business of the partnership, and, in particular, the servicing of the accounts of two consumers, Cooper Alloy Corporation and Stainless Engineering & Machine Works (hereinafter referred to as Cooper and Stainless); that these accounts constituted the major portion of the business and income of Gold and its predecessor, to the extent that the loss of the account would cause Gold to suspend or cease operations; that Gold and its predecessor, for 24 years, sold fuel oil to Cooper and Stainless at an average margin of profit of 3¢ per gallon (wherever figures are given, they refer to the rate per gallon), which fuel oil it purchased from independent suppliers at a rate

permitting such profit; that said profit rate has been standard in the industry, and independent suppliers and major companies, including Esso, have been selling fuel oil to wholesalers and distributors on such profit margin; that on or about December 13, 1958 Esso induced Cooper and Stainless to terminate their relations with Gold by offering to sell fuel oil to Cooper and Stainless at a rate below that at which Esso and other major companies and independent suppliers had been selling to distributors like Gold; that Esso sold to Cooper and Stainless at 10.2¢, a rate substantially below that at which Gold could purchase fuel oil from any suppliers in the industry, whether major or independent; that such action on the part of Esso constituted unfair competition. The first count further charges that such sale is but one of a series of similar sales to ultimate consumers at prices lower than those at which wholesalers or distributors can purchase fuel oil for resale, and thus is an attempt by Esso to monopolize a part of interstate commerce in fuel oil, in violation of 15 U. S. C. sec. 2; that Esso is engaged in interstate commerce, giving the particulars thereof (par. 12, R9a); that the sale was without legal justification and therefore is not fair and lawful competition and constitutes a violation of 15 U. S. C. sec. 13a; and that Esso is liable to Gold in the sum of $500,000 as compensatory and punitive damages.

Esso moved for summary judgment (R11a), appending several affidavits to its notice of motion (R12a through 21a). The facts disclosed by these affidavits are that Cooper and Stainless, in 1958, became dissatisfied with the price Gold was charging them for fuel oil and so advised Gold. Gold then reduced its price from 12.7¢ to 12.5¢. In

October 1958 Cooper and Stainless requested Esso to make a survey of their plant to determine whether or not a saving could be made in the cost of No. 2 fuel oil. Cooper and Stainless were using several hundred thousand gallons of this grade oil annually. Esso made a survey and reported to Cooper and Stainless, in a letter of November 6, 1958, that they should continue to use No. 2 fuel oil. It also advised that, for this grade of fuel oil in tank transport quantities, Esso's price was 10.05¢, plus .33¢ for freight, or a total cost of 10.38¢. Cooper and Stainless sought bids from other suppliers, including Gold, and one bidder quoted a price of 10.2¢ delivered at Cooper-Stainless's plant. Cooper and Stainless so advised Esso and stated that it would like to do business with Esso if the above quoted price could be met. Esso agreed to meet the competitive price of 10.2¢. This figure was arrived at by maintaining the basic price for the fuel oil of 10.05¢, but reducing its haulage charge from .33¢ to .15¢. On this basis, Cooper and Stainless awarded the contract to Esso, to become effective December 1, 1958. Gold requested that its contract be continued for 2 weeks beyond that date in order to permit it to adjust its commitments with its suppliers. This request was granted, and Esso's contract actually became effective December 16, 1958.

By way of counter-evidence, Gold submitted at the hearing, in the Chancery Division of the Superior Court of New Jersey, November and December, 1958 issues of the daily (Monday through Friday) Journal of Commerce, showing daily posted fuel-oil tank-car prices at New York Harbor, inter alia. These exhibits (R75a through 87a, R43a through 73a) show that, on November 24, 1958, the price to resellers

went up from 9.9¢ to 10.4¢ (R83a), and, on December 16, 1958, from 10.4¢ to 10.7¢ (R67a). There was nothing in any of the affidavits submitted by Esso in support of its motion, or anywhere else in the case, to show that Esso's successful bid of 10.2¢ was accepted prior to November 24, 1958, when the price to resellers rose from 9.9¢ to 10.4¢.

The Raising and Decision of the Federal Questions Below.

All the federal questions here raised and asserted below were determined adversely to Gold in the per curiam opinion of the Supreme Court of New Jersey (Appendix A hereto), which reads:

> "The judgment is affirmed solely for the reasons expressed by the trial court with respect to the absence of jurisdiction of the state court to entertain the alleged cause of action." 59 N. J. Super. 6, 16, 18 (Ch. Div. 1959)"

Such federal questions were raised below as follows:

1. The headnote of Point One, F, 4, in Gold's brief in the Appellate Division of the Superior Court of New Jersey—the Supreme Court of New Jersey certified the appeal of its own motion—read (Db24):

> "4. The amended complaint adequately sets forth factually the tort of unfair competition by the defendant by means in violation of 15 U. S. C. A. 13a."

The opinion of the Chancery Division, 59 N. J. Super., at page 15 (R30a) read, in part:

"• • • There are no facts pleaded or set forth in plaintiff's affidavits, or other evidence, which bring the acts of Esso within the orbit of the conduct proscribed by the cited statutes, assuming that these statutes give the plaintiff a cause of action in this court."

2. Such portion of the Chancery Division opinion applies also to the headnote of Point One, F, 3, in Gold's brief below, which read:

"3. The amended complaint adequately sets forth factually the tort of unfair competition by the defendant by means in violation of 15 U. S. C. A. 2."

3. The headnote of Point One, F, in Gold's brief below, read:

"F. The amended complaint adequately sets forth a claim upon which relief can be granted, i. e., the actionable tort of unfair competition, in that the defendant's competition with the plaintiff was conducted by illegal means, per violation of federal anti-trust statutes."

The Chancery Division opinion reads, in part (59 N. J. Super., at pages 12-13, R27a):

"• • • As will be shown hereafter, the plaintiff's cause of action, if it has one, is a right which did not exist at common law and was created by a federal statute, in which statute plaintiff is given an adequate remedy, which is not cumulative, but exclusive."

4. The headnote of Point One, G, of Gold's brief below, read:

"G. The court below had jurisdiction to adjudicate that Esso has been and is guilty of unfair competition by criminal means, i. e., in violation of the federal anti-trust statutes."

The Chancery Division opinion reads, in part (59 N. J. Super., at page 16, R31a):

"The general rule is well settled that only the federal courts have jurisdiction over anti-trust suits."

5. The headnote of Point One, G, 4, of Gold's brief below, read:

"4. In any event, the court below may give relief from the tort of unfair competition, since this action is not one for the enforcement of sections 1, 2 and 13a."

The Chancery Division opinion reads, in part (59 N. J. Super., at page 17, R31a-32a):

"It is clear, despite plaintiff's assertion to the contrary, that this action is one based solely upon the federal statute and, there being a complete and adequate remedy in the federal court, there is no reason why this suit should be continued in this court."

6. The headnote of Point One, G, 3, of Gold's brief below, read:

"3. Furthermore, section 13a of Title 15 may be enforced directly in a state court suit for damages other than treble."

The Chancery Division opinion reads, in part (59 N. J. Super., at page 16, R31a):

> "• • • It (Gold) admits that no private right of action exists in the federal court for a violation of 15 U. S. C. A. sec. 13a, • • •."

And (59 N. J. Super., at pages 17-18, R32a-33a):

> "• • • Thus, it is clear that the remedy given to the plaintiff for any injury caused by the violation of the anti-trust laws by Esso is actionable in the federal courts. And, it is only actionable there."

7. The headnote of Point Two, b, of Gold's brief below, read:

> "B. The fact that Esso was invited to bid by the plaintiff's customers cannot excuse a violation of sections 1, 2 or 13a of Title 15."

The Chancery Division opinion reads, in part (59 N. J. Super., at page 14, R29a):

> "Esso did not seek this business, but, along with other suppliers, including the plaintiff, was asked by Cooper to submit bids. • • • If the defendant's motives were proper, and the means used were proper, there is no unfair competition."

Reasons Relied on for Allowance of the Writ.

The foregoing questions are ones of substance and nation-wide importance not heretofore determined by this Court.

1. The 10.2¢ price at which Esso sold to Cooper and Stainless was unreasonably low and for the purpose of eliminating Gold as a competitor. "It is, indeed, 'unreasonable, per se,' to foreclose competitors from any substantial market." *United States v. Griffith*, 334 U. S. 100, 107. "It is clear that Congress by the Clayton Act and Robinson Patman Act barred the use of interstate business to destroy local business, • • •." *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, 120 (1954). "The recognized purpose of the Robinson-Patman Act is to reach the operations of large interstate business in competition with small local concerns." *Standard Oil Co.* v. *Trade Comm'n*, 340 U. S. 231, 237-38 (1951). The purpose of the act is to protect small business against monopoly-producing practices by large competitors. 70 Harv. L. Rev. 1490, 1493 (1957). "Ruinous competition by lowering prices has been recognized as an illegal medium of eliminating weaker competitors." *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 236 (2d Cir. 1929). "Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. But as a necessary incident thereto, it is concerned with predatory price cutting which has the effect of eliminating or crippling a competitor. For, surely there is no more effective means of lessening competition or creating monopolies than the debilitation of

a competitor." *Atlas Building Prod. Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950, 954 (10th Cir. 1959).

2. Paragraph 11 of the amended complaint at bar reads (R8a):

> "The said sale is in violation of Title 15, U. S. C. A. Sec. 2, in that it is but one of a series of similar sales direct to ultimate consumers at prices lower than those at which wholesalers or distributors can purchase in the fuel oil market for resale, thus constituting an attempt by • • • Esso • • • to monopolize a part of interstate commerce in fuel oil; and is therefore not fair competition."

"To monopolize trade or commerce, or part thereof, is to exclude persons therefrom. It is not, however, to exclude all persons." *Patterson* v. *United States*, 222 F. 599, 619 (6th Cir. 1915). "It is the exclusion of others from the opportunity of doing business that is regarded as monopolizing." *National Biscuit Co.* v. *Federal Trade Commission*, 299 F. 733, 738 (2d Cir. 1924), cert. den. 266 U. S. 613. "Monopoly can as surely thrive by the elimination of • • • small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact, the Sherman Act has constantly been read to forbid all contracts and combinations 'which "tend to create a monopoly,"' whether 'the tendency is a creeping one' or 'one that proceeds at full gallop.'" *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 357 U. S. 207, 213-14 (1959). "'Trade or commerce • • • may • • • be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. • • •'" *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, 467 (1941).

3. The New Jersey courts may give relief from the tort of unfair competition, since this action is not one for the enforcement of sections 2 and 13a. Art. VI, cl. 2, of the United States Constitution says:

> "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the Supreme Law of the Land; and the Judges in each State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

"Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceeding before them." *U. S.* v. *Bank of New York Co.*, 296 U. S. 463, 479 (1936). The state courts have jurisdiction in actions brought independently of the federal statutes for some wrong done, where the federal statutes come incidentally into operation by reason of some regulatory provision contained therein and where the action itself is brought neither for a violation or enforcement of the federal statute nor for the purpose of assailing the validity or legal efficacy of the provisions of the federal statute. *Kells Mill & Lumber Co.* v. *Penn. R. R. Co.*, 89 N. J. L. 490 (S. C. 1916), affirmed 90 Id. 325 (E. & A. 1917).

To paraphrase *De Koven* v. *Lake Shore & M. S. Ry. Co.*, 216 F. 955, 957-58 (S. D. N. Y. 1914), an action in tort, i. e., in trespass on the case, for unfair competition, is a well recognized species of common-law jurisdiction of courts of law. * * * It is not a mere statutory remedy, conferred by the federal antitrust statutes. The plaintiff would be entitled to resort to this remedy if the Sherman Act had pro-

vided no remedy in damages for its enforcement, and the fact that it did provide a remedy for 15 U. S. C. A. 13a, available only to the United States, cannot be held to deprive an individual of a legal remedy which was open to him before and independent of the statute. The fact that the illegal act is made so only by the statute cannot change the result.

It is true that the acts of Esso complained of here would not have given rise to a cause of action at common law. That, however, was so, not because there was no cause of action at common law for illegal competition, but because at common law the acts of Esso complained of here were not illegal. By the antitrust statutes relied upon at bar by the plaintiff, such acts are illegal, and therefore enable the plaintiff to maintain a common-law action for damages in a state court for illegal, i. e., unfair, competition. "The operation of such a statute, in fine, is that the defendant's duty toward the plaintiff as affected by such statute takes the place of what would have been his common law duty if such statute had not been enacted, * * *." *Evers* v. *Davis*, 86 N. J. L. 196, 205 (E. & A. 1914).

A state court has jurisdiction on the basis of the general principles of the law of torts to give a private remedy when a competitor has been injured by unfair competition. The federal statutes set a standard of unfair competition. 33 Mich. L. Rev. 321, 336 (1935). And in *Caraway* v. *Ford Motor Company*, 148 F. Supp. 776, 777 (W. D. Mo. 1957), the court says:

> "A person who has been injured in his trade or business by the activities of an unlawful monopoly, combination or restraint is entitled to recover damages in an action at law for the loss suffered, re-

covery being sustainable both at common law and under the federal anti-trust statutes. Southern States Hotel Co. v. Standard Oil Co. of New Jersey, 26 F. Supp. 633; * * *."

4. Section 13a of Title 15 may be enforced directly in a state court suit for damages other than treble. "A state court has jurisdiction of a suit of a civil nature arising under the laws of the United States, where the federal courts do not have jurisdiction of such a suit." *Christner* v. *Poudre Valley Cooperative Assn.*, 235 F. 2d 946, 951 (10th Cir. 1956). See, also, *Claflin* v. *Houseman, Assignee*, 93 U. S. 130, 136-37 (1876); *U. S.* v. *Bank of New York Co., supra; Murray* v. *Chicago & N. W. Ry. Co.*, 62 F. 24, 43 (C. C., N. D. Iowa, 1894); *Ex parte Martin*, 180 F. 209, 211 (C. C., D. Ore., 1910).

As this Court well knows, a private action for treble damages may not be maintained for practices violating only section 3 of the Robinson-Patman Act, viz., 15 U. S. C. sec. 13a. *Nashville Milk Co.* v. *Carnation Co.*, 355 U. S. 373 (1958).

5. The fact that Esso was invited to bid by Cooper and Stainless cannot excuse a violation of sections 2 and 13a of Title 15. Neither of such sections excepts from its provisions persons who are invited by the consumer to compete for his custom. An invitation to an interstate giant to compete with local small business cannot be deemed to endow the former with carte blanche to set at naught the policy and prohibitions of the anti-trust laws of Congress, and as well the beneficent and comprehensive common-law and equitable principles distinguishing between fair, and unfair and illegal, competition.

Conclusion.

It is therefore respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court.

Respectfully submitted,

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A Member of the Firm.

SAM WEISS,
On the Petition.

APPENDIX A.

Opinion of the Supreme Court of New Jersey.

SUPREME COURT OF NEW JERSEY.

A-128. SEPTEMBER TERM 1959.

GOLD FUEL SERVICE, INC., a corporation of the State of New Jersey,
Plaintiff-Appellant,
vs.
ESSO STANDARD OIL COMPANY, a corporation of the State of Delaware,
Defendant-Respondent.

Argued May 24, 1960. Decided June 6, 1960.

MR. SAM WEISS argued the cause for plaintiff-appellant. (MESSRS. POLLIS, WILLIAMS & PAPPAS, attorneys.)

MR. BURTIS W. HORNER argued the cause for defendant-respondent. (MESSRS. STRYKER, TAMS & HORNER, attorneys.)

PER CURIAM.

The judgment is affirmed solely for the reasons expressed by the trial court with respect to the absence of jurisdiction of the state court to entertain the alleged cause of action. 59 N. J. Super. 6, 16, 18 (Ch. Div. 1959).

APPENDIX B.

Mandate of the Supreme Court of New Jersey.

This cause having been duly argued before this Court by Mr. Sam Weiss, counsel for the appellant and Mr. Burtis W. Horner, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Chancery Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Chancery Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the HONORABLE JOSEPH WEINTRAUB, Chief Justice, at Trenton on the sixth day of June, 1960.

FILED
Jun 6 1960
John H. Gildea
Clerk

JOHN H. GILDEA,
Clerk of the Supreme Court.

APPENDIX C.

Pertinent Excerpts from Federal Constitutional and Statutory Provisions.

Article VI, clause 2, of the Constitution of the United States provides, in part:

> "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the Supreme Law of the Land; and the Judges in each State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

15 U. S. C. sec. 2 provides, in part:

> "Every person who shall monopolize, or attempt to monopolize, * * * any part of the trade or commerce among the several States, * * * shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments."

15 U. S. C. sec. 13a provides, in part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, * * * to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.
>
> "Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."